In the Supreme Court of the United States.

OCTOBER TERM, 1910.

EDGAR G. MONDOU, PLAINTIFF IN error,
v.
THE NEW YORK, NEW HAVEN & HARTFORD Railroad Company. } No. 313.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

NORTHERN PACIFIC RAILWAY COMPANY, plaintiff in error,
v.
BESSIE BABCOCK, AS ADMINISTRATRIX of the estate of Ora L. Babcock, deceased. } No. 383.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.

I.

GENERAL STATEMENT.

The United States, by permission granted here, has intervened in order to be heard in support of the constitutionality of the act of Congress approved April 22, 1908—the Employers' Liability Law—under

which, in each of these causes, damages are claimed for injuries suffered during the year 1908. Both were decided upon demurrer. The courts of Connecticut held the act unconstitutional; the United States Circuit Court in Minnesota upheld it.

In the *Mondou* case the plaintiff, while employed as a fireman on a railroad engine drawing an interstate train in the State of Connecticut, was injured by a freight car constituting part of another interstate train of the same carrier moving in the opposite direction. The car was negligently permitted to be out of repair by employees controlling and operating the train.

In the *Babcock* case, the plaintiff is administratrix of her husband, who, while employed as a locomotive fireman on an interstate passenger train, was fatally injured in a collision with an interstate freight resulting from the negligence of other employees in charge of the trains.

In each case an employee of a common carrier by railroad while engaging in interstate commerce and while he was employed therein was injured through the negligence of other employees of the common master while likewise engaged.

The late Solicitor General, Mr. Bowers, prepared during July, 1910, a forceful brief in support of the statute, which having been formally adopted by the Attorney General is on file. He specially stressed this proposition: "Interstate commerce, if not always, at any rate when the commerce is transportation, is an act;" Congress has power to pass any ~~act~~ law

which, in the exercise of a fair discretion, it may consider proper to make that act more secure, reliable, efficient, or less subject to interruption; and the statute in question is within such discretion. There is nothing for me to add to his masterly reasoning on that point. Accordingly this brief will be devoted to some other suggestions which seem worth considering.

The Employers' Liability Act of 1906 in substance provides:

SEC. 1. That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States * * * shall be liable to any of its employees, or, in case of his death, to his personal representative * * * for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

Section 2 modifies the common-law doctrine concerning contributory negligence by providing that where the employee's is slight and the employer's gross, damages shall be diminished proportionately.

Section 3 prohibits the employer from pleading as a bar the terms of any contract of employment, indemnity, etc.

Section 4 prescribes a limitation of one year; and section 5 that nothing in the act shall limit the duty

of common carriers, etc., under the Safety Appliance Act.

Congress intended by the act of 1908 to avoid the defects in that of 1906 held unconstitutional in respect of commerce between the States because it undertook to fix the carrier's liability to any employee whether he was engaged in interstate commerce or not and thereby to regulate domestic commerce. (*Howard* v. *Illinois Central R. R. Co.*, 207 U. S., 463; January 6, 1908.)

The act of 1908 in substance provides:

SEC. 1. That every common carrier by railroad, while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2 imposes liability upon a railroad common carrier in the Territories, District of Columbia, etc., for damages suffered by any person while employed by it in any such jurisdiction when occasioned by negligence of the same kind as that described in section 1.

Section 3 provides that contributory negligence of an employee shall not bar recovery, but that the damages shall be diminished in proportion thereto, and that no contributory negligence shall be found where the carrier has contributed to the injury by violating any statute enacted for the safety of employees.

Section 4 provides that where violation by the common carrier of a statute enacted for the safety of an employee contributes to his injury he shall not be held to have assumed the risk of the employment.

Section 5 prohibits contracts and devices intended to evade liability under the act.

Section 6 prescribes a limitation of two years; section 7 extends the definition of "common carrier" to include a receiver, and section 8 saves rights which may have accrued under other acts.

Obviously, from a consideration of its very terms, the act of 1908 only affects the mutual rights and liabilities of railroad carriers and their employees while both are engaging in interstate commerce. Liability is imposed on the carrier solely in cases where it or some agent or servant in the course of his employment has been negligent. The suggestion that this may result from the default of an individual employed by the carrier but at the time acting wholly outside the scope of his employment is too strained to deserve much consideration. The effect of the statute is to compel a railroad carrier, while actually engaged in interstate commerce, to guarantee or in-

sure the safety of employees while likewise actually engaged therein against injuries resulting from the negligence of itself or of other agents or servants.

In each of the instance cases injury was suffered by an employee of a railroad carrier while he was actually engaged in interstate commerce which resulted from the negligence of other employees likewise engaged. But I assume for the argument that negligence in the course of his employment of any officer, agent, or servant of the carrier, whether he was engaged at the moment in interstate commerce or not, might create liability against the carrier.

II.

The principles of law necessary for solving the questions in issue have been definitely determined by this court.

In *Howard* v. *Illinois Central R. R. Co.* (207 U. S., 463, January 6, 1908) this court in terms affirmed the power of Congress to legislate concerning the mutual rights and liabilities of master and servant when both are actually engaged in interstate commerce.

In *Adair* v. *United States* (208 U. S., 161) the power of Congress to legislate on the subject was spoken of as settled. The portion of the act there called in question was held invalid because repugnant to the fifth amendment and also because in no proper sense a regulation of interstate commerce.

In *El Paso & N. E. Ry. Co.* v. *Gutierrez* (215 U. S., 87, 96, 97, Nov. 15, 1909) the Employers' Liability Act of 1906 was declared valid in so far as it relates to com-

merce within the Territories. Among other things, speaking for the court, Justice Day said: "Congress might have regulated the subject by laws applicable alone to the Territories * * * over which its plenary power gave it undoubted right to pass a controlling law, and to make uniform regulations covering the subject."

The inhibitions of the fifth amendment apply with full force within the Territory of New Mexico, where the injury occurred. *Rassmussen* v. *United States* (197 U. S., 516). The necessary result, therefore, of the judgment in the *Gutierrez* case was to reject the contention that the act of 1906 violates the fifth amendment. Objections predicated upon that amendment, which are now urged against the act of 1908, apply with equal force to the earlier act, and therefore must be considered as overruled.

In *Atlantic Coast Line R. R. Co.* v. *Riverside Mills* (January 3, 1911) this court upheld the Carmack amendment of January 29, 1906, which imposes liability upon a railroad receiving property for transportation in interstate commerce for damage thereto occurring upon a connecting line notwithstanding a contract undertaking to exempt it. Justice Lurton, speaking for a unanimous court, held the provision a proper regulation of interstate commerce and not in violation of the fifth amendment.

In *Mobile, etc., Railroad Co.* v. *Turnipseed* (December 19, 1910), a statute of Mississippi abrogating the common law fellow-servant rule as to "every employee of a railroad corporation," was held not to be

in conflict with the fourteenth amendment. Justice Lurton, speaking for the court, referred to *L. & N. Railroad* v. *Melton* (218 U. S., 36), where the whole matter of classification was considered, and added: "Nothing more need be said upon the subject, for the case upon this point is fully covered by the decision referred to." In the *Melton* case it was held that the modification of the fellow-servant rule as to railroad employees made by a statute of Indiana does not offend against the equal protection of the laws clause of the Federal Constitution because construed as applying to all employees doing work essential to the carrying on of railroad operations and not limited to those engaged in and about the mere movement of trains. Such general classification of railway employees is a proper exercise of the police power.

See Also *Griffith* v. *Connecticut*, decided December 12, 1910; *German Alliance Ins. Co.* v. *Hale*, decided January 16, 1911.

III.

The relationship—the reciprocal rights and liabilities—between a railroad carrier and its employees arises out of agreement; and when both parties are actually engaged in interstate commerce this agreement is an essential part thereof over which Congress has plenary power of regulation subject only to the restrictions of the Constitution.

"The relation of master to servant has been gradually changing during the course of legal history. At first a status, the position of a servant or workman then became the subject of contract pure and simple, with such incidents deduced, or perhaps added, as in

the opinion of the Courts were the legal outcome of the relationship viewed as purely a contractual one. Lastly, the relation of master and servant has become a matter of State regulation, with a rapidly progressive tendency to restrain its contractual freedom by considerations of public duty and State policy." Beven on Employers' Liability, p. 3.

"The relation of a workman to his employer now-a-days at common law arises entirely from contract; and all those terms are to be read into the formal contract which are necessarily or ordinarily attached in the circumstances of the society in which the contracting parties make their agreement." Id, p. 5. (See also on this general subject Rueggs on Employers' Liability, 7th edition.)

"Agency is a legal relation, founded upon the express or implied contract of the parties, or created by law." Mechem on Agency, sec. 1.

"In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and undertakes to observe his directions in some lawful business. The relation is purely one of contract and the contract may contemplate or stipulate for any services and any conditions of service not absolutely unlawful." Cooley on Torts, 531.

In *Farwell* v. *Boston & Worcester R. R. Co.* (4 Met., 49, 56), Chief Justice Shaw, after speaking of the rule of *respondeat superior* applicable where strangers are concerned added: "But this does not apply to the case of a servant trying his action against his own employer to recover damages for an injury aris-

ing in the course of his employment, where all such risks and perils as the employer and servant, respectively, intend to assume and bear may be regulated by the express or implied contract between them, and which in contemplation of law must be presumed to be thus regulated." (See also *Priestley* v. *Fowler*, 3 Mees. & W. 1; *Murray* v. *South Carolina Railroad*, 1 McMullan 385; *Thomas* v. *Quartermaine*, 18 Q. B. D., 685.)

In *Chicago, etc., Railway Co.* v. *Ross* (112 U. S., 377, 382) this court accepted the doctrine that the reciprocal rights and liabilities of master and servant arise out of contract, and this now may be treated as settled. (See *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, 647; *Northern Pacific R. R. Co.* v. *Hambly*, 154 U. S., 349.)

On this general subject attention is called to a forceful article by Prof. Floyd R. Mechem in The Illinois Law Review for November, 1909.

While I know of no declaration in specific terms by this court that the agreement between master and servant when both are engaged in interstate commerce is itself a part thereof, a consideration of the obvious facts connected with the operation of railroads together with the holdings concerning other contracts in sundry cases, some of which are referred to below, seems to compel acceptance of the proposition. (See dissenting opinion, Mr. Justice Moody, in *Howard* v. *Ill. C. Ry.*, 207 U. S., 463, 529, 530.)

What constitutes interstate commerce and what is a regulation of it are practical questions to be decided

in view of the rights involved in each case. *Alfred Dozier* v. *Alabama* (218 U. S., 124). The operation of a railroad carrier in interstate commerce is impossible without servants—the human instrumentalities who must perform the necessary acts. These always proceed under agreements, express or implied, which are immediately essential to the movement—without which, indeed, it would be impossible. The lack of power to control such agreements by prescribing their terms or otherwise would result in inability completely and effectually to regulate the course and current of commerce as ordinarily conducted through the instrumentality of railroads.

Without doubt Congress has plenary power to regulate whatever is interstate commerce, subject only to the restrictions of the Constitution. *United States* v. *Delaware & Hudson Co.* (213 U. S, 366).

The act of 1908 directs that certain terms shall be implied as a part of the contract of service between the railroad and its employees; and it has prohibited the incorporation therein of others. It removes certain special obstacles, not present where other persons are concerned, to the servant's right to recover damages of the master which have been supposed to arise out of the contract upon which the relationship is founded. At the common law, by implication, there was read into every contract of service an agreement by the employee to assume the ordinary risks of the business. This has been destroyed.

The general effect of the statute is to incorporate into the contract of hiring a guarantee by the master

of the servant's safety against the negligence of itself or other employees; and in case of damages arising from such negligence to give a right of recovery which shall not be entirely defeated by proof of mere contributory negligence.

Manifestly, the statute acts directly and solely upon a contract between parties who are engaging in interstate commerce. Such a contract, I submit, is itself an essential part of interstate commerce, and, consequently, to prescribe its terms is a direct regulation thereof. So viewed, it is a matter of no concern whether the ultimate result is to facilitate or retard. The power of Congress over the subject is limited only by the prohibitions of the Constitution itself, and its action is valid unless violation of some one of these can be shown.

* * *

It has long been established doctrine in this court that, in the absence of action by Congress, the States may legislate concerning the relationship—the rights and liabilities—between master and servant operating in interstate commerce. But such declarations have been constantly coupled with the statement that the general subject is within the control of Congress whenever it may choose to exercise its power. *Martin* v. *Pittsburg, &c., R. R.* (203 U. S., 284, 294.)

Thomas Sherlock et al. v. *Charles Alling* (93 U. S., 99, 103, 107):—

Action in an Indiana State court against the owners of a steamer for damages on account of the death of a

passenger on a steamboat navigating the Ohio River caused by a collision the result of the negligence of the carrier's servants. Defendants set up that the colliding boats were engaged in interstate commerce and that the owners were not liable for injuries occurring through the carelessness of the ship's officers; and especially that they were not liable because of the negligence of the pilot whom they were compelled to take by the terms of the statute. The court, speaking by Mr. Justice Field, said:

> (103) It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. * * *
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> The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. * * *
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> (107) Where a pilot is required to be taken from those licensed, the relation of master and servant is not changed; that the pilot con-

tinues the servant of the owners, acting in their employ, and receiving wages for services rendered to them, and that the fact that he is selected for them by persons more capable of judging of his qualifications cannot alter the relation.

See also *Old Dominion S. S. Co.* v. *Gilmore* (207 U. S., 398).

Western Union Tel. Co. v. *Commercial Milling Co.* (Nov. 28, 1910):—

Action for damages for failure to deliver an interstate telegram based upon a statute of Michigan which prohibited a contract limiting liability for negligence. The court held that in the absence of action by Congress the statute created no illegal interference with interstate commerce; that it was in aid of and did not create a hindrance thereto. The pertinent cases are referred to and discussed.

* * *

The contract between a passenger and an interstate carrier is a part of interstate commerce subject to regulation by Congress. Accordingly, a State legislature can not prescribe its terms in such way as to interfere with the free flow of commerce between the States.

Hall v. *De Cuir* (95 U. S., 485):—

The Louisiana Legislature, by an act approved February 23, 1869, undertook to empower common carriers to prescribe certain rules for the management of their business "provided said rules and regulations

make no discrimination on account of race or color." De Cuir, a colored woman, took passage upon a boat plying between New Orleans and Vicksburg, Miss., to Hermitage, a landing within Louisiana. She was refused accommodations in the cabin specially set apart for white persons and brought an action for damages, relying on the statute. This court through the Chief Justice said (p. 490):

> Congressional inaction left Benson [the master] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana. * * * If the public good requires such legislation it must come from Congress and not from the States.

Chiles v. *Chesapeake & Ohio Ry. Co.*, 218 U. S., 71, May 31, 1910):—

This was an action by a negro, alleged to be an interstate passenger, seeking damages because required under the rules of the railroad to occupy a coach specially set apart for members of his race. The court held the regulation was proper and that no damage was sustained.

See *Louisville, N. O. & T. Ry. Co.* v. *Mississippi* (133 U. S., 587); *Plessy* v. *Ferguson* (163 U. S., 537, 540).

See also *N. J. S. Co.* v. *Brockett* (121 U. S., 637), holding in effect that the relationship between car-

rier and passenger arises out of contract and that the latter is entitled to protection under the implied contract to carry him safely.

"A passenger is one who travels in some public conveyance by virtue of a contract, express or implied with the carrier, as the payment of fare or that which is accepted as equivalent therefor."

"The passenger takes his ticket always with the understanding that he will conform to the reasonable regulations of the carrier as to the conduct of the carriage; and it has been held that an obedience to such regulations is a condition of the contract to carry, though not expressed in the contract or known to the passenger." Hutchinson on Carriers (3rd ed.), secs. 997, 1077.

* * *

The contract of sale negotiated by a traveling agent representing a manufacturer in another State and the purchaser is a part of interstate commerce and can not be taxed or otherwise restricted by State legislation so as to burden commerce between the States.

In *Robbins* v. *Shelby Co.* (120 U. S., 489) this court held: It is not "competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states, for selling or seeking to sell their goods in such state before they are introduced therein" (p. 494).

Such restrictions affect the very foundation of interstate trade. "But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing and seems to us

clearly a tax on interstate commerce itself. * * * The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce" (p. 497).

Alfred Dozier v. *Alabama* (218 U. S., 124, 128):—

An Alabama statute undertook to impose a license tax on persons soliciting orders for pictures or picture frames. Dozier, as agent for a Chicago company, took an order for a portrait to be delivered in an appropriate frame which the purchaser could accept or not at factory prices. A conviction was sustained by the State court on the ground that the sale of the frames was a wholly local matter. Justice Holmes, speaking for the court, said:

> It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain. * * * In fact the frames were sent on with the pictures from Chicago, and were offered when the picture was tendered, as part of a transaction commercially continuous. * * * We are of opinion that the sale of the frames can not be so separated from the rest of the dealing between the Chicago company and the Alabama purchaser as to sustain the license tax upon it.

See also *Rearick* v. *Pennsylvania* (203 U. S., 507); *McCall* v. *California* (136 U. S., 104).

* * *

A contract for the transportation of goods between different States by vessel or railroad is a part of

interstate commerce whose terms may be prescribed or regulated by act of Congress.

The Delaware (161 U. S., 459, 471, 472):—

The Harter Act, passed in 1893, makes it unlawful for the owner of a vessel transporting property to insert in a bill of lading a clause relieving him from liability for damages arising from specified negligence. Concerning it, this court said through Mr. Justice Brown:

> It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo. The act was an outgrowth of attempts, made in recent years, to limit, as far as possible, the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation, and other forms of liability which had been held by the courts of England, if not of this country, to be valid as contracts and to be respected even when they exempted the ship from the consequences of her own negligence.

In *Martin* v. *The Southwark* (191 U. S., 1) the controversy arose over a failure to furnish a refrig-

erating apparatus in good order and repair, and it was held that stipulations in a bill of lading can not relieve a carrier from the discharge of the duty under the Harter Act to use due diligence to provide a seaworthy vessel.

See *Patton* v. *T. & P. Ry. Co.* (179 U. S., 658, 663).

Atlantic Coast Line R. R. v. *Riverside Mills* (decided January 3, 1911):—

This was an action to recover from the initial carrier the value of goods lost while beyond its lines notwithstanding the provisions of a through bill of lading undertaking to exempt it therefrom in alleged conflict with the Carmack amendment. This court, speaking through Justice Lurton, said:

> The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one State to a point in another State" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents. * * *
>
> Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence. * * *

> In substance Congress has said to such carriers, "If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper." It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

* * *

The contract for service between a sailor and a vessel engaged in foreign commerce is part thereof and its terms may be directly prescribed by Congress.

Patterson v. *The Eudora* (190 U. S., 169, 176):—

The act of 1898, making it unlawful to pay any seaman wages in advance of the time when he actually earned them, or to pay such advance to any other person, was held valid. It was strenuously insisted that the statute went beyond the power of Congress because, among other things, it violated the liberty of contract guaranteed by the Constitution. Mr. Justice Brewer in behalf of the court said:

> Contracts with sailors for their services are, as we have seen, exceptional in their character,

> and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the State, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce.

See also *Robertson* v. *Baldwin* (165 U. S., 275), holding valid a statute permitting the arrest and return of a sailor who had violated his contract by departing from the ship.

* * *

Congress may prescribe the character of instruments to be used in interstate commerce and declare the result of a failure so to do upon the agreement of employment between master and servant.

Johnson v. *So. Pacific Co.* (196 U. S., 1):—

Johnson, a brakeman, in attempting to couple an engine with a dining car standing on a side track was killed. The engine and the car were not equipped with couplers capable of connecting automatically by impact. Action was brought under the act of March 2, 1893, entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The court construed the act to require automatic

couplings, but declined to pass upon the question of contributory negligence. Section 8 of the act provided that any employee injured by a car used contrary to its provisions should not be deemed to assume the risk although he knew the unlawful use.

Schlemmer v. *Buffalo R. & P. Ry. Co.* (205 U. S., 1):—

This was an action under the act of March 2d, 1893, for the death of a brakeman killed while attempting to couple a shovel car not equipped as the act requires. Section 8, referred to in the *Johnson* case above, was construed and upheld.

St. Louis, etc., Ry. Co. v. *Taylor* (210 U. S., 281, 294, 295):—

Action under the act of March 2, 1893, for the death of a brakeman killed while attempting to couple two cars which it was claimed were not properly equipped. The act was construed and it was held that the lower court properly refused to instruct that the defendant was not liable if it used reasonable care to keep the drawbars in the condition prescribed. Mr. Justice Moody in behalf of the court said:

> In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. * * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the stand-

ard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it.

I respectfully submit that the act of 1908 is free from constitutional objection.

J. C. McREYNOLDS,

Special Assistant to the Attorney General.

FEBRUARY, 1911.

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